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Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil: comments by the State

Note by the Secretariat

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Please recycle

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil: comments by the State*

I. Introductory remarks

1. The Brazilian State received an advance unedited version of the report regarding the visit to Brazil undertaken by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juán E. Mendez, from 3 to 14 August 2015.

2. The State appreciates the observations and recommendations indicated by the Special Rapporteur. The report's content and its indications provide a critical analysis of the current policies and allow the Brazilian government to examine the challenges it faces in the prevention of torture. In addition, the recommendations will also shed a light on topics which should be prioritized.

3. The Brazilian government would like to highlight that in some instances the Report has resorted to generalizations, statements lacking temporal or spatial reference, and allegations portrayed as statements of fact, all of which pose obstacles to confirmation by the Brazilian government and to the adoption of measures needed to address the problems noted.

II. Specific comments

4. Paragraph 11. In relation to the statement that "international treaty rights have special constitutional status" in Brazil, it is important to clarify that only human rights treaties, when approved by both houses of Parliament by three fifths of their members in two rounds of votes, have constitutional status. All other treaties have the ordinary status of federal law.

5. The process of incorporation of international treaties into the national legal framework is as follows: the President of the Republic is competent, according to Brazilian Law, to sign international treaties; once signed, treaties are sent to Congress for approval through a legislative decree; after approval by Congress, treaties are sent back to the President for ratification; once ratified, treaties have to be promulgated through a presidential decree to come into force at the domestic level.

6. Once the presidential decree is published and the instrument of ratification is deposited, treaties are in force for Brazil both in the national legal framework and at the international level.

7. Paragraph 16. It states that overcrowding in the Brazilian prison system can reach "up to 852%" in one State. According to INFOPEN, the main compilation of statistics in this domain, in June 2014 the Brazilian prison system had 376,669 vacancies, whereas the prison population was 607,731, resulting in a national overcrowding rate of 161%. Disaggregated data show that the highest overcrowding rate was found in the State of Pernambuco, with 265%, not 852%. (Source: MINISTÉRIO DA JUSTIÇA (2015). Levantamento Nacional de Informações Penitenciárias – INFOPEN Junho de 2014. Brasília, Ministério da Justiça, pp. 11, 37.)

* Reproduced as received.

8. Paragraph 18. With regard to the claim made by the Report that pre-trial detainees spend in average five months in pre-trial detention, Brazil would like to further specify that the data relevant to confirm the allegation would require an analysis of court proceedings of individuals deprived of their liberty, which, at the moment, has not been made.

9. However, in order to address this question, the National Penitentiary Department (DEPEN) has collected data on the number of pre-trial detainees in pre-trial detention for more than 90 days. According to the prison units that provided data to DEPEN, around 60% of pre-trial detainees spend more than 90 days awaiting trial.

10. The Brazilian government kindly requests the Special Rapporteur to either specify the source of the alleged information according to which "people who apparently served their sentences are not being released" or withdraw it.

11. Paragraph 19. It states that the re-offending rate can reach "up to 80%" in Brazil. However, there is no thorough empirical study about the re-offending rate for prisoners in Brazil. A recent report prepared by the Institute for Applied Economic Research (IPEA) for the National Council of Justice (CNJ) indicates a re-offending rate of 25% (one-quarter). Other surveys cited in the same report indicate somewhat higher rates, but usually below 50%. (Source: INSTITUTO DE PESQUISA ECONÔMICA APLICADA (2015). Reincidência Criminal no Brasil – Relatório de Pesquisa. Rio de Janeiro: IPEA, p. 111.)

12. Paragraph 26. It states that "Afro-Brazilians" account for 48% of the national population. The portion of the population referred to as "Afro-Brazilians" comprises those who declare themselves "black" ("preto") or "brown" ("pardo"). In the 2010 census, these two groups amounted to 50.7% of the population, not 48% (7.6% black; 43.1% brown). (Source: INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (2011). Censo Demográfico 2010. Rio de Janeiro: IBGE).

13. Paragraph 33. Its item 2 criticizes Joint resolution 1/2014 of the National Council on Criminal and Penitentiary Policies and the National Council on Policies for LGBTI People, which provides for the creation of special cells for LGBTI persons, arguing that "only about 5% of establishments" have such cells. That Resolution was adopted in April 2014 and the quoted data are from June 2014. A timespan of two months is not enough to judge the adequacy of that Resolution.

14. In the case of item 5 of the same paragraph, which states that the rights and entitlements of the LGBTI population in Brazilian prisons depends on "the individual declaring him or herself LGBTI", the Brazilian government would like to highlight that self-identification is an important means to ensure the empowerment of the individual regarding his/her sexual orientation or gender identity and to ensure the realization of his/her human rights. In addition, Brazil underlines that it is not up to the government to decide their gender identity. Although the mechanism of self-identification may present some shortcomings, any other means of defining, in a heteronomous fashion, the sexual orientation or gender identity of the prisonal population would be inadequate.

15. Paragraph 34. It states that the creation of specific wings and cells for LGBTI individuals "may contribute to further exclusion and isolation". Nevertheless, Joint Resolution CNCD-CNPCP 1/2014 provides that LGBTI individuals will only be moved to such wings and cells at their own request. If they feel excluded or isolated, they can at any time request to return to standard wings and cells.

16. Paragraph 35. It states that LGBTI persons are "likely to be additionally affected by inadequacies stemming from overcrowding". Joint Resolution CNCD-CNPCP 1/2014 establishes that LGBTI individuals are entitled to medical assistance according to the National Policy for Integral Healthcare for Lesbians, Gays, Bissexuals, Transvestites and Transexuals, in addition to the general policy applicable to detainees (PNAISP). The same

Resolution also provides that transvestites and transsexuals undergoing hormone treatment have the right to continue such treatment if they are under detention. In view of the above, there is no reason to assume that LGBTI persons under detention will be in relative disadvantage in terms of healthcare.

17. Paragraph 44. It states that the units of the Pedrinhas Complex ("Complexo Penitenciário de Pedrinhas") visited by the Special Rapporteur are called "Pedrinhas I" and "Pedrinhas II". In fact, the names of the visited units are: "Penitenciária de Pedrinhas" and "Casa de Detenção" (the latter is also known by the acronym CADET).

18. Paragraph 44 states that, at the time of the visit, units in the Pedrinhas complex were "very overcrowded". In fact, "Casa de Detenção" (CADET), the main unit of the complex visited on that occasion, had 665 inmates for a capacity of 600 (overcrowding rate of 111%). Maranhão has the lowest rate of overcrowding among Brazilian States – 121% (Source: MINISTÉRIO DA JUSTIÇA (2015). Levantamento Nacional de Informações Penitenciárias – INFOPEN Junho de 2014. Brasília, Ministério da Justiça, p. 37.).

19. Paragraph 44 states that food at Pedrinhas complex was "sorely inadequate". In fact, as attested during the visit, the same food is eaten by both prison guards and inmates. Despite being very critical of the government in other respects, representatives of the prison guards' trade union stated that there was nothing wrong with the food provided. According to them, inmates complained because they are dissatisfied with the new disciplinary regime that prevents them from cooking their own food inside the cells, as they used to do in the previous administration.

20. Paragraph 45. It states that the unit wholly managed by a private company visited by the Special Rapporteur ("Presidio do Agreste", Arapiraca, Alagoas) had its perimeter guarded by the military police. In fact, the perimeter of the unit is guarded by prison guards, who are civil servants of the State of Alagoas. The military police are a separate corporation which does not operate in that unit.

21. Paragraph 49. Since the Report states that testimonies "pointed" to a methodical use of torture and ill-treatment by police in the course of arrests and in the interrogations, the Brazilian government requests that the very serious allegation that torture is being used as a method by the police be either grounded on more detailed and precise evidence or withdrawn.

22. Paragraph 52. From Brazil's perspective, the report could be strengthened if generalizations such as the statement found in paragraph 52 were avoided and were replaced instead by precise information.

23. Paragraph 60. Brazil understands the National Committee for the Prevention and Fight against Torture, as well as the National Mechanism for the Prevention and Fight against Torture represent a robust policy to deal with the scourge of torture, even though the implementation of that policy has started not long ago.

24. Paragraphs 61 and 62. They present data about killings during police operations disaggregated by race and age. It is stated that there are reports that "high level Government officials may have publicly encouraged these methods". It should be clarified what high officials are referred to and on what grounds that accusation is made. The Brazilian government neither supports nor condones such methods. Given the seriousness of this allegation, the Rapporteur should present more precise information about the source of this accusation and about the officials concerned (whether Federal or State level officials, positions occupied etc.). Absent such supporting information, this allegation should be withdrawn.

25. Paragraph 63. The recommendation to approve bill 4,471/2012 should be addressed to the National Congress. The Federal government is working to have such bill approved by the Congress.

26. Paragraph 64. From Brazil's perspective, the report could be strengthened if generalizations such as the statement found in paragraph 64 were avoided and replaced by more precise information.

27. Paragraph 66. It mentions the killing of 111 prisoners at a military police intervention in "Carandiru Penitentiary" ("Casa de Detenção de São Paulo"). Those killings occurred in 1992 (not in 2014, as stated) and the penitentiary was demolished in 2002. In 2014 a single judge sentenced the case, which began in 2013. A total of 84 police officers were sentenced for participating in the killings.

28. Paragraph 67. With regard to investigation of homicides in general, not only those committed in prisons, the Federal government, through the National Secretariat of Public Safety of the Ministry of Justice, has developed and published protocols such as the "Thematic Booklet on Investigation of Homicides" and a set of Operational Standard Procedures of Investigation, Forensics and Crime Scenes.

29. Paragraph 71. Brazil requests the Special Rapporteur to kindly rectify the information contained in paragraph 71. According to Brazil's Federal Constitution, military agents accused of military crimes are tried by military courts, which are also composed of civilian judges. When the victim of the crime is a civilian, the military agent will be tried in the same way as any other person.

30. Paragraph 77. The Brazilian government believes that generalizations such as the statement that "investigations of allegations of torture, ill-treatment, and deaths in custody, are not properly complemented with scientific examinations of the victims" should be either grounded on precise information or avoided in the report.

31. Paragraph 82. INFOPEN is a system for the collection of statistical data on the Brazilian penitentiary system. In relation to paragraph 82 of the preliminary report, Brazil informs that in 2014 important methodological changes were made to the system in order to improve the collection of data and the diagnosis of the problems affecting the prisonal system, thus enabling the Brazilian government to design public policies appropriate to the reality on the ground.

32. The changes made are significant. Besides the collection of new information, the new methodology improves the qualitative analysis of the information, based on the compilation of primary source of information registry and on the arrangement of the presentation of data.

33. On the elaboration of data and statistics, the Federal government has invested, from 2012 to 2015, more than 70 million reais in the National System of Information on Public Safety, Prisons and Drugs (SINESP). SINESP is a website of integrated data, in partnership with federative units, allowing for statistic, operational, investigative and strategic consultations on drugs, public safety, criminal justice, prison system, among others. Data from SINESP inform diagnoses on criminality and public safety policies development and assessment. It promotes national integration of data in a standardized way.

34. Developing and monitoring up-to-date statistic data on the actual situation of public safety is an essential element for State intelligence and planning bodies to draft tangible plans to fight criminality, directing investments to strategic sectors and promoting the use of human and financial resources in regions, areas and sectors in need. It is of paramount importance that Brazil has an official system of statistics able to compile and provide precise and timely data and information for the strategic planning of actions to fight criminality.

35. SINESP represents a tool to facilitate and enhance coordinated action by federal units in the fight against criminality, collecting data and information of administrative and managerial nature related to public safety, to the prison system and to sentence execution, as well as to the fight against trafficking in crack and other illicit drugs. Such data are organized and systematized to inform the public safety policy country-wide and enhance transparency and social control of such areas.

36. SINESP was conceived to integrate information related to public safety, prison system and criminal justice of all federal units. It is also meant to integrate such information into new databases, which will provide them with enhanced credibility. As a result it allows for a global vision on public safety in the country and for the development of a national database from which strategic, operational and intelligence information can be extracted.

37. With state-of-the-art tools, SINESP allows for the elaboration of reports, graphics and statistic maps, better representing the country's reality to inform the development of public safety policies.

38. Law 12,681 of July 4, 2012, which established the System, provides sanctions for those states which do not share data, such as the withdrawal of their credentials to access SINESP and the suspension of transfer of resources from the National Fund of Public Safety and the National Penitentiary Fund.

39. Security agents may have access to SINESP through an operational profile. Since they have specific functions and meet particular demands, intelligence agents have an intelligence profile with access to more detailed research than other profiles.

40. Intelligence profiles are registered through digital certificates, with tokens for approximately one thousand agents in the whole country. These profiles will have access to the latest generation researches and will elaborate reports based on connections within the national database, which will significantly broaden the information collected and allow for the identification of problems and tendencies in a short timespan and with more precision.

41. SINESP has two applications that have been extremely useful and can be accessed from any cell phone or tablet, by anybody: the application to identify car plates and the application regarding missing persons and arrest warrants. These applications are part of the "Citizen SINESP" and have been downloaded by more than 7 million people, contributing to the recovery of more than 120 thousand cars and to the implementation of more than 20 thousand arrest warrants.

42. Paragraph 91. Brazil would like to clarify that the criteria applied to appoint NGO members for the National Committee for Prevention and Fight Against Torture are specified in Law n. 12.847/2013, article 7, which states that the Committee membership shall encompass 12 representatives of class councils and non-governmental organizations, such as entities that represent workers, students, the private sector, educational and research institutions, human rights defenders and others who are active in the fight against torture.

43. Paragraph 97. The statement that "access to a lawyer from the moment of arrest is generally not available" is a generalization. According to data provided by INFOPEN, one in four prisons in the country do not provide systematic free legal aid. In 63% of the prisons, however, there is a free legal aid, according to data provided by Infopen.

44. Paragraph 108. It states that medical forensic examinations after custody hearings are "often" attended "by the detaining officers". Contrary to what is said, normally an individual is detained by a police officer (most often from the military police), and left at a civil police station, where he or she will spend a few hours testifying and waiting for the custody hearing. The detainee will then be escorted to the custody hearing by a police

officer on duty on the occasion. It is very unlikely that the same police officer makes an arrest and, several hours later, escorts the same detainee to a custody hearing.

45. Paragraph 122. It states that meals offered to inmates were "unvaryingly nutrientpoor" and that, "possibly due to inadequate transportation, more often than not the meals seem to have gone bad and are inedible once they get to the inmates". Contrary to what is said, in all units visited the diet offered to inmates was balanced, prepared under the supervision of nutrition professionals, and combined proteins, vegetables and carbohydrates. In all the visited units the same food was offered to prison guards, who did not complain about it (see comment on paragraph 44 above). Except for the Pedrinhas Complex, in all places the food was prepared in the same unit, and therefore transportation was not an issue.

46. Paragraph 125. It states that "the Special Rapporteur learned of places where the separation between adults and children, and between men and women, is not observed". Contrary to what is said, the detention systems for juveniles and adults are strictly separated, and in the facilities for both men and women members of the two genders occupy separate wings and cells. Brazil strictly observes the provisions of the UN Standard Minimum Rules for the Treatment of Prisoners concerning female detainees.

47. Paragraph 125 mentions "a recent case, in which 60 women were raped during a rebellion". The Brazilian government has no record of any such event. Given the seriousness of this allegation, the report should present more precise information about the date and place where this rebellion occurred. Absent such supporting information, this allegation should be withdrawn.

48. Paragraph 132. The State also kindly asks the Special Rapporteur to reconsider the information mentioned in paragraph 132. At the beginning of 2015, the Federal Government received complaints regarding precarious conditions and immigrants submitted to long periods of detention at the "connector" in International Airport of Guarulhos in São Paulo. Based on the complaints, during the first semester of 2015, the Ministry of Justice, through the National Secretariat of Justice, set up a task force with the Federal Prosecutor's Office and the Federal Public Defender's Office, both responsible for the the protection of immigrants' rights, and the Municipality of Guarulhos, responsible for cases involving airports in São Paulo, and the Federal Police, responsible for Brazil's migratory control. Additionally, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the National Committee for Refugees were also involved.

49. They conducted visits, local hearings, and adopted measures with a view to stopping violations and preventing new ones. The adoption of these measures started during the first semester of 2015, and as a result the complaints decreased and eventually ceased by the middle of the year. Consequently, when the Special Rapporteur visited Brazil, São Paulo's Airport conditions had already improved, contrary to what is indicated in the preliminary report.

50. For this reason Brazil requests the Special Rapporteur to reconsider the observations relating to São Paulo's International Airport of Guarulhos. It is important to emphasize that, besides the actions taken by the Ministry of Justice, Brazil's National Mechanism to Prevent and Fight against Torture (Federal Law n. 12.847/2013) has the power to visit any place where people are deprived of their liberty, therefore being able to inspect any facility for the detention of immigrants in Brazil. Should the Special Rapporteur consider it useful, Brazil may provide more information on the subject.

51. Paragraph 147. Brazil requests the Special Rapporteur to provide further evidence to ground the statement that there is "systematic torture and ill-treatment", in particular since the Special Rapporteur mentioned in the report that the practice is underreported. Wewould

like to request him to explain why he considers the occurrence of torture in prisons in Brazil is systematic.

52. Paragraph 152. The Brazilian State understands that the reference to a "corrupt administration" in paragraph 152 item (a) should be grounded on more solid information or withdrawn. It is a serious accusation that should be sustained by facts and evidence, and not just mentioned in passing.

53. With regard to paragraph 152 item (b), which recommends that Brazil provide federal prosecutors with powers to charge federal and State level officials with violations of constitutional norms, including prohibition of torture and ill-treatment, the Brazilian government informs that Constitutional Amendment 45/2004 provides for the federalization of crimes against human rights, thus transferring competence from State level courts to federal courts in cases of serious violations against human rights.

54. This way the General Prosecutor's Office is able to bring the case before the Superior Court of Justice in any phase of the investigations or proceedings.

55. However the exceptional character of the measure means that it will only be admitted in cases of extreme seriousness.